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IN THE

Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C.,
Petitioners,

v.

MARK TREESH, Commissioner for the Department of Revenue for the Commonwealth of Kentucky,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

The National Taxpayers Union ("NTU") was founded by concerned taxpayers in 1969. It is a nonprofit,

[1] Pursuant to Supreme Court Rule 37.6, NTU affirms that no counsel for any party authored this brief in whole or in part. No person or entity — other than NTU, its members, or its counsel — made a monetary contribution specifically for the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), the NTU respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari. All of the parties have consented in writing to the filing of this brief, and copies of the consent letters are included in the appendix to this brief.

nonpartisan membership organization devoted to protecting the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax, spending, regulatory and economic issues. The organization has actively participated in matters involving telecommunications policy such as video franchising reform, internet access taxation, and spectrum auctioning. NTU represents over 362,000 members in all fifty states, with approximately 3,000 members in Kentucky.

A fundamental purpose of the NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles in attempting to vindicate their legal and constitutional rights. NTU has litigated against efforts by state and local authorities to erode constitutional restraints on their taxing authority, including the restraints imposed by the "dormant" aspect of the Commerce Clause as defined by this Court. Representatives of NTU have also testified before congressional committees and various state legislatures about the danger to the federalism balance struck by the Constitution that arises when state and local governments exercise unrestrained taxing authority. This experience places NTU in a unique position to advise this Court about the implications of the decision by the United States Court of Appeals for the Sixth Circuit to uphold Kentucky's unconstitutional and discriminatory tax on the multichannel video programming industry.

Based on NTU's experience in the area of taxation, it believes that the Sixth Circuit's decision to uphold Kentucky's tax scheme jeopardizes the Commerce Clause's protection of interstate commerce from discriminatory taxation. Specifically, Kentucky's scheme

is a tax in name and a tariff in effect. Similar, and similarly unconstitutional, schemes have already been imposed upon the multichannel video programming industry by the states of Florida, Utah, North Carolina, Ohio, and Tennessee. By upholding Kentucky's discriminatory tax scheme, the Sixth Circuit has provided states with a roadmap for circumventing the protections of the Commerce Clause. As a result, there is a significant danger not only that other states will impose similar tax schemes to discriminate against interstate competition in the multichannel video programming industry, but also that states will follow Kentucky's lead, which has been blessed by the Sixth Circuit, to impose similar discriminatory tax schemes to provide a competitive advantage to in-state operators in other industries. NTU believes that such discriminatory taxation would be detrimental to the Constitution, to interstate commerce, and most importantly, to the taxpayers whom the Constitution protects. As a result, NTU submits this brief as *amicus curiae* in support of Petitioners.

SUMMARY OF ARGUMENT

Petitioners DIRECTV, Inc. and EchoStar Satellite, LLC ("Satellite Operators") do not exaggerate when they describe the decision of the United States Court of Appeals for the Sixth Circuit as a eulogy for the "dormant" Commerce Clause.[2] The Kentucky tax on multichannel video programming, blessed below by the Sixth Circuit, is a thinly-veiled tariff parading as

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[2] The decision below of the United States Court of Appeals for the Sixth Circuit in *DIRECTV, Inc.* v. *Treesh*, 487 F.3d 471 (6th Cir. 2007), is reproduced in the Appendix to the Satellite Operators' Petition ("Pet. App.") at pages 1a-20a.

a tax. The scheme purports to impose equal taxes on satellite and cable television service. In reality, the tax burden on cable operators is offset by companion provisions freeing cable operators from paying franchise fees to local governments and directing that the proceeds of the tax on multichannel video programming be used to reimburse local governments for the lost franchise fees. As a result, there is little if any net cost impact on cable companies. In contrast, the new taxes imposed on the cable operators' only rivals in the market — the Satellite Operators — are not offset by any similar relief. Thus, only these out-of-state service providers bear the brunt of Kentucky's tax scheme.[3] By upholding this discriminatory tax scheme, the Sixth Circuit has jeopardized the Commerce Clause's prohibition of taxes that discriminate against interstate commerce. The Sixth Circuit's goal may have been merely to avoid extending the Commerce Clause's protections beyond the bounds previously recognized by this Court, in keeping with Justice Scalia's admonishment in his concurrence in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 211 (1994). However, the Sixth Circuit's decision does not preserve the status quo, but rather creates a loophole in the protection provided by the Commerce Clause wide enough to

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[3] In *Directv* v. *Treesh*, the Sixth Circuit made clear that, for purposes of its analysis, it was accepting as true the allegations in the Satellite Operators' complaint that the Satellite Operators "used no infrastructure whatsoever within the state to deliver programming," and that the cable operators, in contrast, made substantial investments in, and had a substantial presence within, the state. See *Treesh*, Pet. App. 9a. Accordingly, NTU treats the Satellite Operators as out-of-state interests and the cable operators as in-state interests for purposes of this brief.

allow states to discriminate in favor of in-state operators no less effectively than if the States were allowed to impose traditional tariffs.[4]

This Court should grant certiorari to prevent a diminution of the protections provided by the Commerce Clause to interstate commerce. This Court should also grant certiorari because the Sixth Circuit's analysis is flawed. The fundamental premise underlying the Sixth Circuit's decision — that the Kentucky tax scheme is permissible because Kentucky is using the proceeds of an industry-wide tax to replace fees owed previously by in-state operators to localities rather than exempting in-state operators from the industry-wide tax or paying a subsidy to in-state operators directly — cannot be reconciled with this Court's Commerce Clause jurisprudence.

In their petition, the Satellite Operators discuss how the Sixth Circuit's fundamental premise cannot be reconciled with *West Lynn Creamery*. NTU agrees with the Satellite Operators on this point. The Sixth Circuit's decision is contrary to this Court's repeated admonishment that state tax schemes must be evalu-

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[4] In presenting this brief, NTU recognizes that states should have discretion to use their taxing authority in a manner that promotes business, attracts industry, and reduces the tax burden on residents. This Court has repeatedly emphasized, however, that there is a line between "tax systems [that] encourage the growth and development of intrastate commerce and industry" and tax systems that discriminate by giving in-state operators an unnatural advantage over their out-of-state rivals in the same industry. See, *e.g.*, *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-337 (1997). NTU asks this Court to grant certiorari in this case because it believes that the Kentucky tax on "multichannel video programming" crosses this line to the detriment of taxpayers.

ated according to the economic realities of the scheme, and that discriminatory state taxation that has the effect of a tariff is unconstitutional regardless of whether it is "forthright or ingenious" in its construction. *West Lynn Creamery*, 512 U.S. at 201. NTU does not repeat the Satellite Operators' arguments regarding why Kentucky's tax scheme is indistinguishable from the tax-and-subsidy scheme in *West Lynn Creamery*. Instead, NTU will highlight two aspects of this case not addressed as extensively by the Satellite Operators.

First, the Sixth Circuit's analysis cannot be reconciled with the decisions of this Court prohibiting states from exempting in-state operators from industry-wide taxes. This Court has repeatedly declared such schemes unconstitutional because they are indistinguishable in effect from a traditional tariff. The Kentucky scheme operates equally as a tariff. It imposes new tax burdens on out-of-state operators while offsetting the tax burden on in-state operators by relieving them of their obligation to pay franchise fees to localities for rights of way across public lands. The net effect is that only out-of-state operators bear an additional burden as a result of the tax. The Sixth Circuit approves of Kentucky's scheme, however, because Kentucky uses the proceeds of its industry-wide tax to pay off other obligations imposed by the State's subordinate localities rather than exempting the in-state operators from paying the industry-wide tax. See *DIRECTV, Inc.* v. *Treesh*, Pet. App. 16a-17a. Indeed, it appears that under the Sixth Circuit's rationale, there is only one burden that states are prohibited from paying off with the proceeds of an industry-wide tax — the industry-wide tax itself — and states are permitted to use the proceeds of an

industry-wide tax to pay off any other burden borne by the in-state operators.

The Sixth Circuit offers no explanation for why this difference is constitutionally significant. Moreover, the Sixth Circuit runs afoul of decades of commerce clause jurisprudence from this Court by impermissibly ignoring the "economic realities" of the tax scheme. At bottom, the Sixth Circuit's decision, if allowed to stand, will undermine the Commerce Clause's protection of interstate commerce by providing states with a roadmap for enacting discriminatory tax schemes that duplicate the effects of a tariff while surviving constitutional scrutiny.

Second, the Sixth Circuit's decision ignores two aspects of the Kentucky tax scheme that this Court has recognized as hallmarks of schemes that discriminate against interstate commerce in violation of the Commerce Clause. The Kentucky tax scheme creates in-state benefits by burdening only out-of-state interests. In addition, it "mollifies" in-state interests that would otherwise be expected to oppose the tax scheme by providing them with a countervailing benefit that is not provided to out-of-state rivals. As we discuss below, this Court has held in a number of cases that when such a statute is enacted, the normal legislative protections against abusive state laws are not present and that it is the proper role of the Commerce Clause to step in and prevent abuse.

One such case is *West Lynn Creamery*, 512 U.S. at 200-201. Justice Stevens, writing for the majority, noted in *West Lynn Creamery* that the Massachusetts tax on the sale of milk there at issue had "mollified" in-state dairy producers with a subsidy that more than offset the burden of the tax on milk distribution. *Id.* The Kentucky tax on multichannel video pro-

gramming similarly mollifies in-state cable companies by eliminating franchise fees and mollifies the localities that had charged the franchise fees by providing them with the proceeds of the tax on multichannel video programming. This Court has repeatedly declared similarly discriminatory schemes unconstitutional under the "dormant" aspect of the Commerce Clause. Accordingly, this Court should grant certiorari and make clear that discriminatory state tax schemes that obtain in-state benefits by burdening only out-of-state interests and subvert the ordinary balancing of interests inherent within the legislative process by effectively bribing in-state interests to support the tax violate the Commerce Clause's prohibition of discrimination against interstate commerce.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION UNDERMINES THE COMMERCE CLAUSE PROHIBITION OF STATE TAXES THAT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

The Sixth Circuit's interpretation of the Commerce Clause is unworkable because it provides states with the capability of using tax schemes to discriminate — practically at will — in favor of in-state operators by imposing nominally equal taxes but then giving the in-state provider an offsetting benefit. The purpose of this Court's "dormant" Commerce Clause jurisprudence has consistently been to deny states this authority. Indeed, this Court has repeatedly struck down state schemes that tax in-state and out-of-state operators in an industry equally, but then provide only in-state operators with credits or exemptions

that neutralize the detrimental effect of the statute. See, *e.g.*, *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981).

The Sixth Circuit takes the position that the Kentucky statute is different, and therefore constitutional, because Kentucky uses the proceeds from the industry-wide tax on multichannel video programming to pay off other state imposed liabilities — franchise fees imposed by the state's subordinate localities — rather than exempting in-state cable operators from the tax on multichannel video programming. See *DIRECTV, Inc.* v. *Treesh*, Pet. App. at 15a-17a. The Sixth Circuit offers no analysis for why this difference is constitutionally significant. Nevertheless, under the Sixth Circuit's view the Commerce Clause only prohibits states from using the proceeds from an industry-wide tax to pay in-state operators' liability under the industry-wide tax itself. According to the Sixth Circuit, states are permitted to impose industry-wide taxes and set aside the proceeds of those taxes to pay-off other burdens on behalf of in-state operators, even when the payment of these burdens nullifies the entirety of the effect of the industry-wide tax on in-state operators and duplicates the effect of a traditional tariff.

This Court has repeatedly rejected the Sixth Circuit's unwarranted, form-over-substance, conception of the Commerce Clause. See, *e.g.*, *West Lynn Creamery*, 512 U.S. at 193. As this Court noted in *Maryland* v. *Louisiana*, "[i]n each case it is our duty to determine whether the statute under attack, what-

ever its name may be, will in its practical operation work discrimination against interstate commerce." 451 U.S. 725, 756 (1981).

Maryland v. *Louisiana* provides a useful example. In that case, Louisiana imposed an industry-wide tax on the "first use" of natural gas in the state, but "provided a number of exemptions from and credits" against other state-imposed taxes to abate the burden of the industry-wide tax on in-state producers and distributors of natural gas, as well as in-state electric companies. This Court noted that the effect of these credits and other exemptions in the statute meant that "Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does uniformly apply to gas moving out of the State." *Id.*

This Court struck down the Louisiana tax and specifically found that Louisiana's practice of providing in-state operators with credits for "first use" taxes paid against other state-imposed taxes violated the Commerce Clause. *Id.* at 759. The Court held that because these entities "may recoup any increase in the cost of gas attributable to the First-Use Tax through credits against various taxes or a combination of taxes *otherwise owed to the State of Louisiana,* Louisiana consumers of OCS gas are thus substantially protected against the impact of the First-Use Tax." *Id.* at 757 (emphasis added) (citation omitted). As a result, this Court struck down Louisiana's "first use" tax scheme, noting that the Commerce Clause mandates "equality of treatment between local and interstate commerce" and that "the pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality." *Id.* at 759.

As this Court recognized in *Maryland* v. *Louisiana*, tax schemes like those enacted by Louisiana and Kentucky that tax an industry evenly but provide exemptions, credits or subsidies that abate the burden of the industry-wide tax on in-state interests violate the Commerce Clause because the "practical operation" of these schemes "'work discrimination against interstate commerce'" just like a traditional tariff. 451 U.S. at 756, quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). Allowing states to enact such schemes, as the Sixth Circuit has done in this case, jeopardizes interstate commerce by providing states with an easily-used contrivance for circumventing the limitations of the Commerce Clause.

This Court has previously recognized that it is useful to consider how a tax scheme could be used to circumvent limitations recognized in the Court's prior Commerce Clause cases. For example, in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Maine*, 520 U.S. 564, 594-95 (1997), this Court compared a Maine tax scheme to a Hawaii tax scheme that had been struck down earlier in *Bacchus Imports LTD* v. *Dias*, 468 U.S. 263 (1984), and struck down the Maine tax scheme because it allowed states to easily circumvent the Commerce Clause protections discussed in *Bacchus*. Likewise in this case, comparing the Kentucky tax scheme to three similarly discriminatory tax schemes that this Court has previously struck down demonstrates how easily states could mimic the Kentucky tax scheme to discriminate against interstate commerce in any industry, thereby rendering the Commerce Clause a dead letter.

In *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984), this Court, in an eight-to-one decision, struck down a

West Virginia tax that required every entity engaged in the business of selling tangible property at wholesale to pay a percentage of its gross receipts to the State, but exempted in-state manufacturers from paying the tax. West Virginia argued that the tax did not discriminate against interstate commerce because in-state manufacturers were subject to a larger tax. *Armco, Inc.*, 467 U.S. at 641. This Court disagreed, held that "West Virginia's tax does discriminate unconstitutionally against interstate commerce," *id.*, and explained that:

> "[t]he tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price." *Id.* at 642.

Under the Sixth Circuit's reasoning in the instant case, West Virginia could have brought about this same discriminatory result merely by creating a fund from the proceeds of the tax on the sale of property at wholesale and using that fund to pay off burdens on behalf of in-state manufactures, such as the manufacturers' local property taxes or even a portion of the state-imposed manufacturing tax. The discriminatory effect would have been the same — only sellers who do not manufacture their goods in West Virginia would face an increased overall burden on the goods they sell in the state — but the scheme would not have run afoul of the Commerce Clause under the Sixth Circuit's analysis.

In *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988), this Court struck down an Ohio tax scheme that encouraged in-state production of ethanol. Under the Ohio scheme, gasoline dealers were given a credit against the state sales tax on gasoline if they mixed their gasoline with ethanol, but only if the ethanol was produced in Ohio or another state that grants a similar credit for using Ohio-produced ethanol. *Id.* at 269. This Court, in a unanimous decision, held that the statute impermissibly discriminates against interstate commerce because it "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States" and "imposes an economic disadvantage upon out-of-state sellers." *Id.* at 274, 275.

Under the Sixth Circuit's rationale, Ohio could have achieved the same discriminatory result without violating the Commerce Clause. For example, Ohio could have imposed a tax on all ethanol sold in the state, created a fund from the proceeds of that tax, and used those proceeds to pay off financial burdens borne by in-state ethanol producers. Specifically, Ohio could have used the proceeds of such a fund to pay the local property taxes of any property used to produce grain for ethanol production, to pay for grain itself and give that grain to in-state ethanol producers, or even to pay a state-imposed tax owed only by in-state producers such as Ohio Rev. Code Ann. § 5737.03 (West 2008), which taxes the handling of all grain, including grain used to make ethanol. Using such a scheme, the state of Ohio could have discriminated in favor of in-state ethanol producers, while at the same time complying with the Sixth Circuit's interpretation of the Commerce Clause.

Finally, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 265 (1984), this Court invalidated a Hawaii tax scheme that encouraged consumption of two kinds of locally produced alcoholic beverages by exempting those beverages from the twenty percent (20%) excise tax Hawaii levied on sales of alcoholic beverages. The locally produced alcoholic beverages that Hawaii attempted to exempt were okolehao — "a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii" — and a locally produced wine made from pineapples. *Id.* This Court had no difficulty in striking down Hawaii's tax scheme as unconstitutional, holding that the exemption for okolehao and pineapple wine "violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." *Id.* at 273. This Court further explained that "[a] cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.'" *Id.* at 268, quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977) (internal quotation marks omitted).

Hawaii, like West Virginia and Ohio in the examples above, would have been empowered to bring about the same discriminatory effect under the Sixth Circuit's interpretation of the Commerce Clause by mimicking Kentucky's discriminatory tax scheme. Instead of a direct exemption for okolehao and pineapple wine from Hawaii's excise tax, Hawaii could have taxed all alcoholic beverages equally and then placed a portion of the proceeds into a State fund for the purpose of paying costs and fees on behalf of manufacturers of okolehao and pineapple wine. For example, Hawaii could have paid the local

real property taxes for any property in Hawaii used to produce okolehao, subsidized the purchase of ti root and pineapple when used in the production of okolehao and pineapple wine, or even used the proceeds to pay off the state-imposed manufacturing tax, Haw. Rev. Stat. Ann. § 237-13 (LexisNexis 2007). The net effect to such a scheme would have been the same — granting local manufacturers of these alcoholic beverages a competitive advantage over out-of-state rivals in the market for alcoholic beverages.

These hypothetical applications of the basic mechanics of the Kentucky tax scheme to tax schemes previously invalidated by this Court demonstrate that the Sixth Circuit's decision below is both erroneous and dangerous. Allowing states to offset the effect of an industry-wide tax on in-state interests by eliminating other burdens borne only by in-state operators is no less discriminatory in effect than exempting in-state operators from the industry-wide tax itself.

In fact, this case presents an even clearer example of discrimination. Unlike the Louisiana scheme in *Maryland* v. *Louisiana* that less obviously abated the effect of the industry-wide tax by simply providing credits against other state-imposed taxes, the Kentucky scheme is blatant in its discrimination. The Kentucky scheme creates a separate fund from the proceeds of the industry-wide tax for the sole purpose of paying off burdens borne only by in-state operators — franchise fees. This is a far more direct, and indeed more troubling, form of discrimination than the offsetting tax credits at issue in *Maryland* v. *Louisiana*. It simply is too easy for states to mimic the Kentucky scheme and discriminate in favor of in-state operators if the Sixth Circuit's analysis is

allowed to stand. Under such a scheme, the ability of a state to discriminate is virtually limitless. This Court has consistently taken the position that the protections afforded to interstate commerce by the Commerce Clause are far more robust. As a result, this Court should grant the Satellite Operators' petition for a writ of certiorari and make clear that states cannot so easily circumvent the protections of the Commerce Clause.

II. THE KENTUCKY TAX SCHEME SUBVERTS THE LEGISLATIVE PROCESS IN THE SAME MANNER AS THE MASSACHUSETTS STATUTE AT ISSUE IN *WEST LYNN CREAMERY* v. *HEALY*.

The Kentucky tax on multichannel video programming bears two hallmarks that identify it as belonging to the category of taxes that this Court has repeatedly struck down as discriminating against interstate commerce. It provides benefits to in-state interests by burdening, exclusively, out-of-state interests. It also mollifies in-state interests that ordinarily would be expected to oppose the tax scheme, thereby circumventing the balancing of interests inherent within the legislative process that is ordinarily relied upon to provide taxpayers with a degree of protection against abusive tax schemes. As the NTU has observed in numerous cases, including cases involving taxes on rental-care services and passenger facility charges on airline tickets, imposing taxes that disproportionately burden citizens who have no vote in the jurisdiction is attractive because of the political benefit it provides. See, *e.g.*, Brian Riley, *The Less You See, The More You Pay: The Burden of Hidden Taxes*, NTUF Policy Paper 104, August 11, 1998.

This Court has long recognized that a purpose of the Commerce Clause's prohibition of state laws discriminating against interstate commerce is to prevent states from succumbing to the temptation to provide benefits to those within the state at the expense of out-of-state interests. For example, in *South Carolina State Highway Dep't* v. *Barnwell Bros.*, this Court noted that its dormant analysis of the Commerce Clause arose from "the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." 303 U.S. 177, 185 n.2 (1938).

This "thought" has been prominent in this Court's more recent Commerce Clause jurisprudence. For example, in *Minnesota* v. *Clover Leaf Creamery Co.*, this Court upheld a Minnesota law banning retail sale of milk in plastic nonreturnable, nonrefillable containers on the ground that it burdened in-state and out-of-state dairies alike, stating that "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." 449 U.S. 456, 473 n.17 (1981). Likewise, in *Kassel* v. *Consol. Freightways Corp. of Delaware*, this Court refused to accord an Iowa law barring use of trucks longer than 60 feet on Iowa's interstate highways the usual "'special deference' to state highway safety regulations," noting that "[t]his traditional deference 'derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus ensuring that a

State's own political process will serve as a check against unduly burdensome regulations.'" 450 U.S. 662, 675 (1981), quoting *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 444 n.18 (1978). The Court held that "[l]ess deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses" and struck down the Iowa law because "Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use." *Id.*

This concern was also a key component of the Court's decision in *West Lynn Creamery*, in which Justice Stevens noted that the Massachusetts tax-and-subsidy scheme was constitutionally problematic because, among other reasons, it provided a subsidy to "one of the most powerful" groups "which would otherwise [be expected to] lobby against the" tax scheme:

> "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy. So, in this case, one would ordinarily have expected at least three groups to lobby against the order premium, which, as a tax, raises the price (and hence lowers demand) for milk: dairy farmers, milk dealers, and consumers. But because the tax was coupled with a subsidy, one of the most powerful of these

> groups, Massachusetts dairy farmers, instead of exerting their influence against the tax, were in fact its primary supporters." 512 U.S. at 200-201.

The Kentucky tax scheme subverts the legislative process, and reaps the same kind of ill-gotten gains, as the statutes at issue in *West Lynn Creamery* and *Kassel*. Kentucky mollified the two powerful in-state interests that ordinarily would have been expected to lobby against its new tax on multichannel video programming. Under Kentucky's tax scheme, in-state cable operators were subjected to a new state-level tax on their video programming for the first time, and localities lost their right to impose franchise fees on cable operators, but both of these in-state interests were "mollified" by the State. Kentucky mollified the in-state cable operators by eliminating the obligation to pay franchise fees imposed by Kentucky's subordinate localities, and it mollified the localities by providing them with the proceeds of the tax on multichannel video programming, thereby ensuring that the localities do not lose revenue. The only party made worse off by Kentucky's tax scheme (besides the state's consumers, who are deprived of the benefits of fair competition) are the in-state cable operators' only marketplace rivals — the out-of-state Satellite Operators — who pay for the benefits provided to the cable operators and localities under Kentucky's tax scheme by paying the full tax with no abatement, whatsoever.

As a result, the Kentucky tax scheme discriminates against interstate commerce just like a traditional tariff. The result is that in-state cable operators can reduce price and gain market share from their out-of-state rivals, the Satellite Operators. This is pre-

cisely the kind of scheme the Commerce Clause was designed to prevent.

In the end, this case is worthy of this Court's consideration for a simple reason. The Sixth Circuit's decision is a serious threat to the continued vitality of the Commerce Clause's protection of interstate commerce from discriminatory taxes. The Kentucky tax on multichannel video programming, blessed below by the Sixth Circuit, is a thinly veiled tariff. As NTU has demonstrated, similar schemes can be implemented by any other state and can be used to discriminate in favor of in-state interests in practically any industry. This Court, in its prior cases, has given the Commerce Clause a robust meaning that cannot countenance the type of discrimination inherent within the Kentucky scheme. Accordingly, this Court should grant the Satellite Operators' petition for a writ of certiorari and make clear that the Kentucky scheme cannot serve as a model for constitutionally permissible discrimination against interstate commerce.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Amicus Curiae
National Taxpayers Union

APPENDIX

APPENDIX

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Howard R. Rubin
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February 15, 2008

VIA E-MAIL AND U.S. MAIL

E. Joshua Rosenkranz
Heller Ehrman, LLP
Times Square Tower
7 Times Square
New York, NY 10036

RE: *DIRECTV, Inc. and EchoStar Satellite L.L.C. v. Treesh*, No. 07-1004 (S. Ct.)

Dear Mr. Rosenkranz,

I am writing to you on behalf of the National Taxpayers Union ("NTU") to confirm our conversation in which I requested the consent of petitioners DIRECTV, Inc. and EchoStar Satellite L.L.C. (collectively, "the petitioners") to NTU filing an *amicus curiae* brief in support of the petition for a writ of certiorari filed in the above-styled action. I appreciate your having provided me with the petitioners' consent and am following up, pursuant to Supreme Court Rule 37(2)(a), to obtain that consent in writing.

Please indicate your consent by signing below and return the signed letter to me by fax at 202-408-6399. Thank you for your assistance. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

/s/ Howard R. Rubin
Howard R. Rubin

/s/ E. Joshua Rosenkranz
E. Joshua Rosenkranz
Heller Ehrman, LLP
Times Square Tower
7 Times Square
New York, NY 10036

Counsel for Petitioners
DIRECTV, Inc. and
EchoStar Satellite L.L.C.

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February 15, 2008

VIA E-MAIL AND U.S. MAIL

Douglas M. Dowell
Office of Legal Services for Revenue
Department of Revenue of the
Commonwealth of Kentucky
P.O. Box 423
Frankfort, KY 40602-0423

RE: *DIRECTV, Inc. and EchoStar Satellite L.L.C. v. Treesh*, No. 07-1004 (S. Ct.)

Dear Mr. Dowell,

I am writing to you on behalf of the National Taxpayers Union ("NTU") to confirm our conversation from yesterday afternoon in which I requested the consent of respondent Mark Treesh, Commissioner for the Department of Revenue of the Commonwealth of Kentucky, to NTU filing an *amicus curiae* brief in support of the petition for a writ of certiorari filed in the above-styled action. I appreciate your having provided me with Commissioner Treesh's consent and am following up, pursuant to Supreme Court Rule 37(2)(a), to obtain that consent in writing.

Please indicate your consent by signing below and return the signed letter to me by fax at 202-408-6399. Thank you for your assistance. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

/s/ Howard R. Rubin
Howard R. Rubin

/s/ Douglas M. Dowell
Douglas M. Dowell
Office of Legal Services for Revenue
Department of Revenue of the
Commonwealth of Kentucky
P.O. Box 423
Frankfort, KY 40602-0423

Counsel for Respondent Mark Treesh